and that D.W.2 and D.W.3 did not have the authority of the plaintiff when they presented those cheques to the defendants' branch manager and other officers for collection and for payment of the proceeds therein into the third party's account. I therefore held that in the circumstances of this case the defendants were liable in damages for conversion of the said cheques. Alternatively, I held that the plaintiff was also entitled to repayment of the said sums of $10,000/-, $50,000/- and $10,000/- as money had and received by the defendants to its use, because it has been conceded by the defence that there was negligence in respect of the collection of the two account payee cheques. As regards the third cheque *i.e.* the bearer cheque I agree with counsel for the plaintiff that no evidence has been adduced to show the circumstances under which that cheque was received for collection and the defendants have therefore failed to prove that it had acted without negligence and were not protected under section 85 of the Bills of Exchange Act and were therefore also liable. I therefore ordered the defendants to pay the plaintiff $70,000/- together with interest at the rate of 8% per annum on $60,000/- with effect from March 26, 1974, and 8% per annum on $10,000/- with effect from April 14, 1974, and costs. Finally I also ordered the third party to indemnify the defendants with an amount equivalent to that paid by the defendants to the plaintiff and costs.

Order accordingly.

Solicitors : *Chan Moosdeen & Partners; Skrine & Co.; Shook Lin & Bok.*

BRUNEI REPORT

WONG SIEW SING v. BAWAI BIN MUNJIL

[O.C.J. (Power J.) April 4, 1985]

[Bandar Seri Begawan – Suit No. 23 of 1984]

Contract – Sale and purchase of land with buildings – Receipt of $400,000 for no payment – Estoppel – Non-payment by defendant – Notice of termination – Rescission – Counterclaim for specific performance – Credibility of witnesses.

The plaintiff in this case claimed for a declaration that she has effectively rescinded the agreement dated January 30, 1983 ("the first agreement") which she entered into with the defendant relating to the sale to him of 12 units of industrial buildings erected on her land Lot 9452, situated at Sungai Meng lait, Gadong, some 4 k.m. from Bandar Seri Begawan.

On January 10, 1980, the plaintiff received permission from the Competent Authority, to erect the 12 units of buildings. On May 26, 1982, the Authority, however, notified her that her construction of a bridge and buildings in respect of the land was illegal and she was required to clear the site within 60 days. She did not comply with the notice and in fact carried on building the units. The authorities have not taken any further action under the notice. In January 1982, the plaintiff obtained a loan of B$600,000 from a Bank to finance the building of the units, secured partly by a charge over the land. The loan was insufficient and on August 8, 1982 the plaintiff, who acted all the time under the direction of her husband, sold one unit of the building. By December 1982, the Bank was pressing the plaintiff for repayment of the loan and she had to sell 2 more units in an attempt to raise money to pay the Bank. But this attempt through one Datuk Carvalho and one Major Hussin to raise the money was unsuccessful. The husband said at this point the defendant came on the scene. So on January 20, 1983 the plaintiff entered into a Sale and Purchase Agreement with the defendant and, although he paid no money, she issued him with a receipt for $400,000. The defendant could not get a loan and nothing was paid. The defendant, however, said he paid the sum of $400,000 in cash. The husband said that on January 27, 1983 the defendant told him the defendant had more chance to raise a loan if the plaintiff sold all 12 units to him. Thus the first agreement was entered into between the plaintiff as vendor and the defendant on January 30, 1983 for the price of $4,000,000. The husband said the defendant was in doubt whether he would be able to raise the $4,000,000 and that a second agreement, also dated January 30, 1983 was signed, which gave 4 units to the plaintiff in lieu of the payment of $1,350,000. It was indisputable that the defendant did not pay $750,000 to the Bank. Eventually, as the defendant could not raise the money, the plaintiff on April 7, 1983 wrote to the defendant terminating the first agreement, *i.e.*, the sale and purchase agreement of January 30, 1983. The defendant, however, said that on April 9, 1983 the husband told him that the letter of termination of April 7, 1983 was cancelled and that they would "carry on according to" the agreement of January 30, 1983. The defendant counterclaimed for specific

performance. The decision of the learned trial judge turns on the credibility of the witnesses.

Held: (1) the defendant was wholly unconvincing as a witness and there was a hollow ring of fabrication in his evidence time after time. The evidence of the husband was in all important aspects truthful and correct and the defendant told repeated and deliberate lies. The defendant was untruthful to an extent which satisfied the court that no credit could be given to his evidence. Deliberate fabrication occurred throughout his evidence;

(2) no estoppel arose and the plaintiff is entitled to a finding that the $400,000 was not paid by the defendant;

(3) the plaintiff is entitled to a declaration that she had effectively rescinded the agreement of January 30, 1983. The defendant's counterclaim for specific performance and consequential relief is dismissed;

(4) the defendant is to pay the plaintiff's costs.

Case referred to:

(1) *United Scientific* v. *Burnley Council* [1978] A.C. 904, 944.

CIVIL SUIT.

Peter Ling (*Feridahanam Abang Zen (Miss)* with him) for the plaintiff.

R. R. Sethu (*Raymond Szętu* and *Peter Chang* with him) for the defendants.

Cur. Adv. Vult.

Power J. : The plaintiff, Wong Siew Seng, owned a piece of land, Lot 9452, situated at Sungai Menglait, Gadong, approximately four kilometres from the town centre of Bandar Seri Begawan. It was clear from the evidence of the plaintiff that she is unable to speak or write English, has little knowledge of business affairs and that she acted throughout under the direction of her husband, Yong Seong Hai ("the husband").

On January 10, 1980, the plaintiff received permission from the Development Control Competent Authority, acting under the Town and Country Planning (Development Control) Order 1972 to erect 12 units of industrial buildings on her lot. This permission is attached to Ex. 4 which is a valuation of the land and the units made on January 31, 1983. In the outcome, no one was called to substantiate this valuation and so it was never proved as to the truth of its contents.

Permission was given for the building of an access road from Jalan Gadong northwest of the subject lot across Lots 1624, 3007 and 3010 to the plaintiff's land provided that details thereof be submitted to and approved by the PWD Road Section. The route of this road is set out on a sketch plan (Ex. 7). It was also provided that work on the industrial buildings could commence only after such approval had been given. The permission stated, in para. 9, that "The authority has no responsibility in the event of the breach of the access agreement between the applicant and the owner of Lot 3010." As can be seen, no mention was made of Lots 1624 and 3007 which the road also crossed.

It appears that the road had, in fact, already been built at the time when the permission was granted and that this existing road was approved and that building commenced early in March 1980.

It appears that the owner of Lot 1624 withdrew his permission to use the road about one week after building commenced and that the plaintiff then applied to the Director of Public Works for permission to build a temporary bridge from Jalan Kiulap across Sungai Menglait to her land. This access from the south-east was to replace the closed access from the north-west.

On June 10, 1980, the Director of Public Works stated that he "had no objection provided", *inter alia*, "that you will be asking permission from the proper authorities regarding the use of state land affected by your access and bridge".

On May 30, 1981, the Land Office gave written permission for the access road to be built over Government land.

At some time, it is not clear exactly when, the access road was built and work on the 12 units was continued.

However, on May 26, 1982, the Competent Authority, which had given the original permission to develop the land, served an Enforcement Notice (PB2/1) on the plaintiff which stated that she was "carrying out the following development/building/alteration/extension to a building in contravention of its decision made/condition imposed on...(date) without having obtained its written consent."

The contravention was described as being

"(1) Illegal construction of bridge

(2) Illegal buildings."

The plaintiff was required by the Notice to clear the site within 60 days.

It seems clear that the reason for the service of this Enforcement Notice was the plaintiff's action in erecting a new access road and bridge for which there was no authorization in the original permission from the Competent Authority. The attached explanatory letter of the same date states:

"In October 1981, you were informed that the bridge under construction was illegal and should be demolished otherwise refusals would be given for subdivision, development and the supplies of essential services. A final warning to stop the illegal construction was sent to you on December 31, 1981. Contrary to the Development Control Competent Authority's directions, you have continued work on the illegal bridge and started construction work on the industrial buildings. Accordingly I attach a copy of an enforcement notice relating to the above unauthorized activities."

The plaintiff did not clear the site in 60 days as required by the Enforcement Notice and, in fact, carried on building the units. Up to the present time, no further action has been taken by the authorities under that Notice.

In January 1982, some four months before the service of the Enforcement Notice, the plaintiff obtained a loan of B$600,000 from the Overseas Union Bank ("the Bank") to finance the building of the units which was secured by a Power of Attorney and Memorandum of Charge over the land and by a Personal Guarantee.

The loan, however, was insufficient and on August 9, 1982, the plaintiff sold one unit to Haji Mohd. Yain bin Ismail for $480,000. The husband said that this person paid for the unit by giving cash in the sum of $180,000 and by borrowing $300,000 from his bank. In fact it appears that both of these amounts were lent by the Bank and both were guaranteed by the plaintiff.

The transfer was not registered but it seems that Mohamed Yain bin Ismail used the Sale and Purchase Agreement as security with the bank to obtain the loan. It appears that further monies were raised during 1982 by the sale of another unit for $470,000 to Bronson Hardware Timber Private Limited. This company, the husband says, only paid $210,000 of the purchase price and this sale was also not registered.

By December 1982, the Bank was pressing the plaintiff for repayment of its loan and she sought to raise cash by selling two more units.

On December 4, 1982, she entered into a Sale and Purchase Agreement (Ex. 9) with Dato B.M.G. Carvalho and one Amidah Haji Idris, which purported to sell to the Dato and the other person one unit for $500,000 and which stated that $300,000 thereof was to be paid forthwith, that $150,000 was to be paid upon completion and connection of water and electricity to the Government's mains and that the balance of $50,000 was to be paid on the expiration of six months from the handing over of the premises. Dato Carvalho admitted in evidence that although the plaintiff issued him with a receipt for $300,000, he had, in fact, paid nothing. He said that the receipt was issued "as collateral with the bank to obtain a loan" and "to meet the demands of the Land Office." He said that any loan obtained was not to be used to pay the purchase price but "to carry out my own business" but that, in fact, he never made application for a loan. Shortly thereafter, Dato Carvalho was registered as the owner of 1/12 of the land.

By an agreement dated December 6, 1982, the plaintiff agreed to sell to Major Mohammed Hussin and one Johari Bin Pudin (Ex. 2) one unit upon the same terms as those agreed to by Dato Carvalho. Major Hussin was also given a receipt for $300,000 and he admitted in evidence that he had paid nothing to the plaintiff. He said that the receipt was "to be used for the purpose of effecting a transfer." He also became the registered owner of the 1/12 of the land.

He said that the plaintiff desired his name on title deed and that it was agreed that he "was to pay later on" when he "was able to". Major Hussin said that although the figure in the agreement was $500,000 he was, in fact, to pay only $300,000.

The husband, in his evidence, said that he sold the two units to Dato Carvalho and Major Hussin to raise money to repay the Overseas Union Bank the $600,000 owed to it. He said that the agreement mentioned $500,000 but that he had actually agreed to sell for $300,000. He said that the receipts were issued to enable the purchasers to borrow money from the bank but that this "was not a success and that no money was paid." He said that "two weeks later they came back and told me that they were unable to get the loan and also asked me to find ways and means to sell to others because they were unable to help."

I am satisfied that neither Dato Carvalho nor Major Hussin were prepared to be frank as to the arrangement between themselves and the husband and I have no hesitation in accepting the husband's evidence in this regard that he and the two purchasers

attempted to raise the $600,000 needed by the plaintiff by borrowing that amount upon the strength of the Sale and Purchase agreements and the receipts which, on their face, showed that the purchasers had each bought a unit of an agreed value of $500,000 and had each paid $300,000 of that amount. It is not surprising that the purchasers were not prepared to admit that they were parties to this arrangement which was clearly designed to mislead prospective lenders. The two purchasers would clearly benefit from such an arrangement as each would become registered owner of a unit upon which they owed $300,000 which, I am satisfied, was the amount that the husband had agreed to accept, whose real value all parties appear to have accepted, was substantially in excess of that figure.

I have no doubt that the husband was content with the arrangement because he thought that the plaintiff would be placed in a position to make a substantial repayment to the bank and that each of the purchasers was happy because he felt that he had placed himself in the way of realizing, in due course, without outlay, a substantial profit on resale. Whether or not Major Hussin and Dato Carvalho made any real attempt to obtain loans, I do not know, but I am satisfied that they told the husband that they had done so without success. In the event the husband was forced into an attempt to raise money from other sources. It was, according to the husband, at this point that the defendant entered the scene.

He said that on December 15, 1982, he found the defendant who, after negotation, said: "one unit $500,000 – I give you cash if you sell me $400,000 but I also do not have money but I also am able to raise the loan from the bank." He said that the defendant asked him to make a "genuine agreement" and to issue a receipt for $400,000 and that he would "go to the bank and apply for a loan and the bank will then believe."

In consequence of this, he said that on January 20, 1983, the plaintiff entered into a Sale and Purchase Agreement with the defendant and that although the defendant paid her no money, he was issued with a receipt for $400,000 (DB2/1). He said the defendant later told them that he was unsuccessful in his attempt to raise a loan and that nothing was paid.

The evidence of the defendant in this regard was very different from that of the husband. He said that he first met the plaintiff and her husband in early October 1982 when he was offered a shop unit for $500,000. He said that he counter offered a figure of $4000,000 which the husband said he would consider and that, at the end of October, the husband offered him a unit for $450,000 but that there was no agreement until January 15 or 16 when the parties agreed to a figure of $400,000. He said instructions were given to Irene Appaduray to draw up the documents on January 17 or 18 and on January 19, the plaintiff and her husband told him that the $400,000 was not to be paid in the lawyer's firm. He said that on 20th, the documents were signed and that the parties then went to his office where he paid over $400,000 in cash, it being the proceeds from the sale of a property. He said he was given a receipt and that John Appaduray, who wrote out the receipt, was present when the money was paid. It seems to be common ground that initially, the receipt was wrongly made out and that it was changed. The evidence differed as to the day on which this was done.

The defendant said that he was paid $450,000 when he sold his house on November 8, 1982 and he suggested that it was because of the continuing negotiations with the husband, which had commenced in October, that he kept this money in cash, in readiness, in a safe in his house.

The husband said that on January 27, the Defendant came and told him that he had more chance to raise a loan if the plaintiff sold all 12 units to him.

He said that after bargaining which started at $5,000,000, a figure of $4,000,000 was agreed on and a Sale and Purchase Agreement ("the first agreement") at that price was signed on January 30, 1983. He said that before this agreement was signed, he clearly told the defendant that the Government wanted to demolish the building and that there was no water and electricity and no access road. He says that the defendant said that he was a citizen and a native of Brunei and he guaranteed that he could manage it. Indeed the defendant, although he suggests that these facts were not made known to him at that time, is clearly not relying upon the alleged non-disclosure as he seeks specific performance of the agreement.

The defendant said that on January 25, it was the plaintiff and her husband who suggested that he buy all 12 units for $5,000,000. He said he offered $4,000,000 and that the husband accepted this offer on the next day and that it was agreed

that the $400,000 already paid be subtracted from that figure.

The defendant said that on the 26th, he told the husband he would have to raise money from the bank and the husband agreed. He said that there was some discussion of the "loan which I was to raise."

The first agreement provides that $750,000 more or less, the final amount to be determined on payment, was to be deducted from the purchase price and paid by the purchaser to the Bank to discharge the loans and overdraft facilities owed by the vendor. It provides that the vendor is to pay Major Hussin another $300,000, Dato Carvalho another $300,000, Haji Mohd. Yain Bin Ismail $480,000, Bronson Hardward Timber Private Limited $420,000 and Bawai bin Munjil, the Defendant, $400,000 – a total of $1,900,000. These amounts are the agreed purchase prices, most of which the husband said were unpaid, of the units already sold. The husband said that all of these purchasers were consulted and agreed to the proposal that they should be bought out.

No provision was made in the agreement for the payment of the $1.9 million that was to be paid by the vendor to the former purchasers. This was, however, clearly intended to be part of the purchase price as the $4,000,000 total purchase price was clearly made up of the $750,000 the purchaser was to pay the Bank, the $1.9 million and the balance of $1.35 million. It further provides that the vendor would procure Major Hussin and Dato Carvalho to retransfer to the purchaser the units registered in their names and that the balance of the purchase price, which was expected to be $1,350,000 more or less, would be paid by five equal monthly instalments, the first of which was to be paid on March 30, 1983.

The importance of making the payment of $750,000 to the Bank within as short a time as possible must, I am satisfied, have been in the contemplation of both parties, as not only could the title of the defendant not be registered until the release of the title deeds, which would only take place after payment had been made to the Bank, but also because, as the defendant later admitted, the husband had told him that the Bank was pressing the plaintiff for repayment.

If the husband was truthful when he said that the defendant had not paid his $400,000, then it seems clear that the requirement to pay $400,000 to the defendant, under the agreement of January 30, would have been dealt with, not by an actual payment, but by a debit and credit entries. The other amounts, however, even though some were unpaid, could not have been dealt with in this way. Each of those amounts, whether or not the plaintiff had to pass them on, seems clearly to have been part of the purchase price and would, as such, have had to be paid by the defendant.

The husband said that the defendant had no money and that he was in doubt as to whether he would be able to raise the $4,000,000 and that a second agreement ("the second agreement") [PB1/11] was, therefore, prepared which required the defendant "to pledge four units for security to" the plaintiff. In his regard, it was the defendant's version that the plaintiff had a change of mind and decided to retain four units.

This second agreement, which is also dated January 30, 1982, gives 4 units to the plaintiff in lieu of the payment of the balance of $1,350,000, more or less, which was to have been paid by 5 equal monthly instalments. I have no doubt, although this was not admitted by the defendant, that it was entered into because there was some doubt as to the financial capacity of the defendant.

The husband said that early in February, he, the plaintiff and the defendant went to the Land Office to make a transfer of title and that the plaintiff signed a Memorandum of Transfer (PB1/14) at that office. He said that, at that time, the plaintiff's signature was the only signature thereon and that Major Hussin and Dato Carvalho were not present. The plaintiff and the husband denied knowledge of the transactions, which the defendant said he had, at this time, with the Major and the Dato.

The defendant said that on February 7, he, the plaintiff and her husband went to the Land Office and signed a Memorandum of Transfer and that Carvalho and Hussin, both of whom, the plaintiff said, had been informed, failed to appear.

He said that on February 8, the plaintiff and her husband told him that Hussin and Carvalho refused to sign the Memorandum of Transfer unless they each received $500,000 and that the husband said that he did not want to discuss with them again and asked him to see them.

He said that he went to see them and they insisted on being paid $500,000 but that the next

day, they agreed to $300,000 but insisted that he pay the money to them direct in cash and that after the plaintiff and her husband agreed that he should do so, he obtained a loan of $300,000 from the Bank of America. He had Lucas Siong draw up Agreements of Rescission and on the 15th, he went with Lucas Siong's clerk to office of Hussin and Carvalho, paid each B$300,000 in cash, received receipts therefor and each signed an Agreement of Rescission.

He said that he then asked Dato Carvalho for a loan of $100,000 and that after signing an acknowledgement (Ex. 10), he was given the money. He said that the three of them then went to the Land Office and signed the Memorandum of Transfer in front of the Land Officer.

The evidence of the Dato and the Major, in this regard was that the defendant approached them and asked them to transfer their interest in the land to him. Each said that they agreed to do so for $300,000 and that although each had issued a receipt in that amount, at the request of the defendant, had been paid only $100,000. The Major added that at a later date, he had received a further $5,000.

Each said that he had not discussed this transaction with the plaintiff or her husband and had not had any authorization from them with regard thereto.

As to the I.O.U., the Dato said that the defendant had originally promised to give him and the Major a total of $300,000 and that the I.O.U. was given to cover the shortfall between the $200,000 given and the $300,000 promised.

Both witnesses said that the defendant had approached them a week before the trial and asked them to say that each had been paid the $300,000 in full.

I do not intend to further detail the evidence of these 2 witnesses as, in my view, neither was making any real effort to recollect and recount the transactions that occurred in February 1983. It seemed to me clear that once the prospect of substantial profit without risk had disappeared, both did their best to forget the incident and that neither was prepared to make any real effort to recall it.

In cross-examination, the defendant's counsel had put it to the Major and the Dato that the defendant had approached them and requested them to see his solicitor. The defendant, while under cross-examination, denied that he approached Major Hussin and Dato Carvalho a week before the trial for any purpose. I set out below the exchange which occurred in this regard:

"Q. Did you approach Carvalho and Hussin to come to Court to say that they had received $300,000?

A. No.

Q. Did you approach them?

A. No.

Q. You did not approach them one week before this case?

A. No."

The answers seemed to be clearly at variance with what had been put to the Major and the Dato by the defendant's counsel when cross-examining them. However, when it came to re-examination, the defendant sought to explain this variance by saying that he saw them "two weeks" before the trial and asked them to see his "lawyers".

The defendant said that on February 15, he told the husband that Hussin and Carvalho had signed and that it was then that the husband told him, for the first time, that there was a problem about the supply of water and electricity and the bridge. According to him, he did not seek, having been told this, to avoid the contract but wrote immediately to the acting Menteri Besar (Ex. 22).

In this letter, the defendant said that the land had been transferred to him and that he

"immediately demolished the said bridge and hope to get your approval to reconstruct the said bridge again as soon as possible due to that my interest loan is getting more if the business will not be able to carry on as soon as possible. I sincerely hope for Pehin's co-operation and that this matter will be considered and approved. Enclosed herewith a copy of the plan for the construction of the access road to Lot 9452 through the state land. As such I sincerely hope that the Pehin will approve the shophouse building, which is built on Lot 9452, Kg. Menglait, Gadong."

According to the defendant, he had only learnt of the problem with the bridge on the 15th, the day he wrote this letter. This being so, he must have carried out the demolition of the bridge and obtained the plan for the construction of the access road with extraordinary expedition. Later, however, in answer to a question from the Bench, he said that the statement that he had demolished the bridge had been incorrectly made as a result of his

inadvertence. The letter certainly indicates an awareness on the part of the defendant that it was in his financial interest to finalize matters as soon as possible. He said that he later showed the plaintiff this letter.

While not too much can be made of it, it is to be noted that the defendant in this letter asked not only for approval for the reconstruction of the bridge but also asked the Pehin to "approve the shophouse building which is built on Lot 9452, Kg. Menglait, Gadong." Might it be suggested that this is some indication that the defendant, at that time, knew that the building, as well as the bridge, was the subject of a demolition order.

Whatever else may have happened during February and March, one thing clearly did not happen – the defendant did not pay $750,000 to the Bank. The defendant said his loan application to the Chartered Bank was approved by a letter dated March 15, a copy of which he gave to the husband.

He said that certain loan documents were prepared by Dr. Ronnie Lee and signed by the plaintiff, Carvalho and Hussin at the office of Ibrahim, Chee and Co. on March 30. He said that he and the plaintiff and her husband had no discussion after leaving Dr. Lee's office on that day.

He said that he got a reply from the acting Menteri Besar on March 30 (Ex. 23) which he showed to the husband. This letter is no more than a cautious indication that, in due course, if the Commissioner of Town and Country Planning is consulted and the guidance and advice "of appropriate bodies especially the Development Control Committee" followed, the defendant would be able to overcome the problem that has arisen. The defendant said that it was only then that the husband showed him the letter of May 26, 1982 (PB2/1) which ordered the demolition of the units. He said, "I lost my mind and was confused because of the contents." Again, however, he did not seek to avoid the contract. Indeed, he was clearly keen that it remained afoot.

On March 30, the plaintiff wrote a letter (DB1/17) to the Manager of the Overseas Union Bank authorizing him to disclose the balance of her account and to release the title deed of the land for inspection.

The husband, in cross-examination, agreed that before that date, he had been told by the defendant that the Chartered Bank had agreed to make the loan and that he had told the Overseas Union Bank to "hold on". He denied having been told anything else about the loan and said he was not shown any letter of approval.

The husband said that on March 31, he and his wife went with the defendant to the office of Ibrahim, Chee and Co., where his wife signed some documents to assist the defendant in the raising of a loan from the Chartered Bank. He says that the defendant had told him that if his wife signed this paper and they went to the bank, they would get the loan. He said that the documents had not been fully explained and that the defendant had simply said "you sign all the papers and I can raise the loan" and had told him "don't make too much confusing and refusing. Sign it and you can get the money tomorrow."

It appears that the "documents" were, in fact, a Power of Attorney (Ex. 16) and a Memorandum of Charge (Ex. 17). The Power of Attorney, signed by the plaintiff, Major Hussin and Dato Carvalho, requested the Chartered Bank to make a loan of $3,000,000 to the defendant and gave to the Bank to secure the loan, a Power of Attorney, with a power of sale, over the property. The Memorandum of Charge, whereby the above three gave the bank a charge over the subject land, was never executed.

The husband said that, on the way back from this meeting, he asked the defendant if he could draw out the money on Monday. It will be remembered that this was two months after the signing of the first agreement and that, according to the husband, no moneys had, up until then, been paid under that agreement.

He said that the defendant then said that when water, electricity, the road and the certificate of occupation were ready, the money could be drawn from the bank. The defendant, in examination-in-chief, denied that he said any such thing to the husband. However, in cross-examination, he conceded that he did say that to the husband on that day but he was, of course, also maintaining that he had earlier given him a copy of the letter from the Chartered Bank (DB1/2). That letter states that "No funds will be available before the completion of our securing documentation and the issuance of the Certificate of Occupany for the property." What the husband says, he was told by the Defendant, is, of course, what the Bank had stated in the letter.

He said that he then told the defendant that he could not wait. The husband said further that, before the signing of the loan paper, the understanding was that the money would be paid into the plaintiff's account but that after the signing, he ascertained that the money was to be paid into the defendant's account.

On April 3, the plaintiff wrote (PB1/15) to the Chartered Bank stating that she "wished to withdraw to stand as surety in respect of" the defendant's loan and that she wished "to cancel all agreements and documents relating to the loan and the land."

The defendant said that on April 5, he got the plaintiff's letter of April 3, (PB1/15) in which she informed the bank that she was withdrawing the Power of Attorney and that he was then told by the husband and wife that this letter was written because they wanted the $3,000,000 put into their account. It is hard to accept that they were taking this attitude if they had not, as they said, been told by him, *inter alia*, on March 30 that the money from the loan would be paid into his account.

On April 7, the plaintiff wrote to the defendant saying "as you are unable to fulfil your part of the covenants in the said Sale and Purchase Agreement, I wish to give notice to you to terminate the agreement for breaches on your part which entitle me to repudiate the agreement."

The husband said that at a later meeting, the defendant asked him why he had cancelled the agreement and he explained that he had to do so because the defendant could not raise any money. He said that on April 9, the defendant told him that the loan was not successful and suggested that they settle the whole account of the money being paid and that on April 19, 1983, the defendant told him that the money could not be raised for the loan and there was no sale and that he would have to refund him the money he had spent. He said that the defendant asked for $540,000, $340,000 of which was for work done on the units and $200,000 was to be paid to Major Hussin and Dato Carvalho and that he told the defendant that he had no money at that time and asked for three months to pay to which the defendant agreed.

He gave further evidence, which I will not detail, that when he raised the money, the defendant refused to accept it.

The evidence of the defendant was very different in this regard. He said that on April 9, the husband told him that the letter of April 7, whereby the plaintiff terminated the agreement of January 30, 1983, was cancelled and that they would "carry on according to" that agreement. If this be so, it was a sudden change of heart on the part of the plaintiff and one which was neither confirmed in writing to the defendant nor put into effect by a letter to the bank withdrawing the letter of April 3. The defendant gave evidence of efforts he continued to make to have the land transferred to him and to obtain an Occupancy Permit. The husband denied having any knowledge of these matters.

There were interlocutory proceedings in 1984 in which the plaintiff had the defendant restrained from carrying out demolition of the bridge. In this regard, the defendant said in his evidence that the Plaintiff agreed to demolish the bridge and that he and she went to do so on February 5, 1984 but that two to three days later, she started to reinstate the bridge. He said he saw her and explained that they had to abide by the law and she agreed that he demolish the bridge and that he commenced to do so in early March.

He said that the plaintiff again changed her mind and obtained an injunction to prevent him from proceeding further with the demolition.

Under cross-examination, he agreed that he had not put any of the above facts in his affidavits filed in opposition to the application for an injunction. The defendant's evidence in this regard was, in my view, palpably false and I have no hesitation in rejecting it.

I turn now to the evidence with regard to the 27 receipts issued by the plaintiff to the defendant and dated from January 25, 1983 to April 19, 1983 which total $340,264 (DB2). The husband says that he issued these receipts to the defendant in amounts which the defendant told him represented expenditure on works which he had done on the premises.

He said that this was agreed at the time of the signing of the first agreement, January 30, 1983, so that if the deal did not go through, the defendant could be recompensed for amounts spent in improving the property.

He said that the buildings were completed, except for the installation of water and electricity in December 1982, and that the defendant em-

ployed workers to improve the buildings by putting mosaic tiles on the walkways, laying concrete in the car park, enclosing the drains with bars and doing work for the installation of water and electricity.

The defendant, in paragraph 3 of his Amended Defence and Counterclaim, pleaded that the $340,263 was cash advanced to the plaintiff intended to be used to discharge the defendant's obligation to pay $750,000 to the Overseas Union Bank under para. 3 of the first agreement. It was also pleaded that the plaintiff agreed to redeem the title from the Bank in her own time and at her own expense.

The defendant, in evidence, said that the amounts detailed on the receipts were loans to the Plaintiff to enable her to complete the units. The defendant, in his evidence in chief, made no suggestion that he was not, under the first agreement, buying the units as they stood and he gave no evidence that the amounts which he said he gave to the plaintiff were to be used by her to relieve him of his obligation under para. 3 of the first agreement

He was asked in cross-examination to explain how it was that, according to him, the plaintiff continued to spend hundreds of thousands of dollars on the buildings after the sale to him on January 30. To explain this conduct of the plaintiff which, on his evidence as it stood, was quite inexplicable, he said that on January 28 or 29, the husband had said that he would complete the whole building if he was paid $4,000,000.

He further said, "Before I purchase I told the husband that the building was not ready and he replied he will complete the building of the shophouses before the agreement was made." It is difficult to know exactly what was meant by the last five words; however, it is clear that the defendant was saying that on January 28 or 29, the husband agreed that if the plaintiff was paid $4,000,000, he would complete the building of the shophouses.

The defendant produced Ex. 12 which is a "Confirmation/Receipt" signed by the plaintiff whereby she confirms, on January 31, 1983, that "the receipts I gave to Mr. Bawai Bin Munjil are part payments for the purchase of my light industrial shophouses . . . as per agreement dated January 30, 1983." The defendant suggested that this document related to payments both before and after January 31, 1983. On its face, it clearly does not. There are in fact only three receipts which bear dates in January. It certainly gives no support to the pleading that the receipts are, in some way, referable to the defendant's obligation under para. 3 of the first agreement.

The husband said that he had no memory of Ex. 12 at all and that the first few receipts, although dated in January, had not been issued until early in February.

In cross-examination, the defendant produced some cash sale invoices (Ex. 25 and 27), which he said were produced to him by the husband at the time when two of the receipts were issued. These are wholly inconclusive as, except for one, they simply show cash sales of building materials to an unnamed purchaser. I must, in this regard, be remembered that the defendant was, on his own admission, a building contractor.

One invoice did bear a cheque number. The defendant admitted that this was one of his cheques and said that it had come to be used for payment because the husband had, on this one occasion, asked for a cheque.

As to the receipt issued on April 19, the husband said that, although it was not issued until April 19, it was referable to amounts which he and the defendant had reached agreement about on March 18. In support of this evidence, he referred to PB2/26, on which he had noted the date March 18, 1983. If the dates on the invoices are correct, this evidence of the husband must be wrong. The defence suggest that this is of very great significance as it indicates a deliberate lie on the part of the husband to conceal conduct late in April which clearly indicates he had reaffirmed the first agreement.

In answer to questions from the Bench, the defendant agreed that he knew that the plaintiff was being pressed by the bank for repayment when they entered into the agreements on January 30, 1983 and that it was important to obtain the release by the bank of its hold over the land by paying it the stipulated $750,000.

Given the above and taking into account to the obligations of the parties under the first agreement and the fact that the defendant appears, on his evidence, to have had very substantial amounts of money available to him in February and March

1983, why would he not have paid this amount to the Bank?

Why, it must be asked, if he is telling the truth as to the money which he said he had available to him would he pay $600,000, less the $100,000 lent back, to Major Hussin and Dato Carvalho, payments which he was under no obligation to make, and payments of more than $260,000 to the plaintiff for further building costs, again payments which he was under no obligation to make, and leave unpaid the crucial payment of $750,000 to the Overseas Union Bank which he was under a contractual obligation to pay.

Further in this regard one must look at his conduct with regard to the payment of the I.O.U. for $100,000 given to Dato Carvalho which became due on March 15. He says he did not meet that obligation when it came due because "at that time I don't have cash" and yet, according to his evidence, between March 3 and 25, he had more than $143,000 to pay to the plaintiff in cash for building costs again which he was under no obligation to pay.

When assessing the evidence, I have borne in mind the need to approach with caution oral evidence that contradicts contemporary documents and to accept it only after having scrutinized it with particular care. There was a great deal of such evidence in this trial – much of it coming from the husband.

I have set the evidence out at length and I have considered it with care. I found the defendant wholly unconvincing as a witness and heard in his evidence, time after time, the hollow ring of fabrication. I have no doubt that the evidence of the husband was, in all important aspects, truthful and correct and that the defendant told repeated and deliberate lies.

The defendant was untruthful to an extent which satisfied me that no credit could be given to his evidence overall. Deliberate fabrication occurred throughout his evidence. I do no more than set out a few examples thereof. I am satisfied that he fabricated the evidence:

(i) that he first met the husband in October 1982 and that this was done in an endeavour to explain why a businessman would keep a large sum of cash in a safe in his house for a period of over 2 months;

(ii) that the husband told him that the $400,000 was not to be paid in the lawyer's office and that this was done in order to explain how it came to be paid in his office when it could so easily have been handed over at the office of the Plaintiff's lawyer;

(iii) that he had shown the letter from the Chartered Bank (DB1/2) dated 15/3/83 to the husband as soon as he received it and that this was done because he realized that it was crucial to his case to make it appear that the husband took no action after it came to his knowledge that there would be no funds until after the issuance of the Certificate of Occupancy;

(iv) that the husband had, on one occasion, asked him to issue a cheque to pay for one of the cash purchases (Ex. 25) which, he was contending, were being made by the husband and that he was forced into this fabrication because he realized that unless he said that the husband had made such a request, there would be no way of explaining how one of his cheques came to be used for the payment of a cash sale.

As I have already indicated, neither Dato Carvalho or Major Hussin gave me the impression that they were making any real effort to assist the Court but I am satisfied that their evidence is to be preferred to that of the defendant as to the payments which he made to them and as to the meeting, a week before the trial, when he suggested to them that they should lie to the Court about the amount which he gave them.

I am satisfied that the defendant did not give $400,000 in cash to the plaintiff on February 20, and that both the wording of the contract and the giving of the receipt were to assist the defendant in his application for a loan. Mr. Sethu for the defendant submits that even if the money was not paid, that because of those documents and because of the statement in paragraph 4(e) of the first agreement, the plaintiff is estopped from denying such a payment. He suggests that an estoppel by convention arose against the plaintiff and refers to *Spencer, Bower and Turner*, "Estoppel by Representation" 3rd edition at 157. I cannot agree. In my view, the position is correctly stated by the learned authors of that book at 160, when they say:

"The claim of the party raising the estoppel is, not that he believed the assumed version of the facts was true, but that he believed (and agreed) that it should be *treated as true*."

There was no question in the present case of the parties, either believing that the facts were true or agreeing that they should be treated as true. Both knew them not to be true and, as between themselves, had agreed that they were not to be treated as true. I hold that no estoppel arose and that the plaintiff is entitled to a finding that the

$400,000 was not paid. The stipulation in paragraph 4(e) of the first agreement which untruthfully suggests that such a payment of $400,000 had been made by the defendant and which was, no doubt, made in the interest of consistency, is not, I am satisfied, capable by itself or in combination with the other documents of raising an estoppel.

I am satisfied that the defendant entered into the first agreement with knowledge of the difficulties as regards access and the threatened demolition and that the plaintiff was being pressed by the Bank to repay the overdraft referred to in paragraph 3 of that agreement.

Was time of the essence of the first agreement? I respectfully accept the statement in *United Scientific* v. *Burnley Council*[1] which affirms that the law in this regard is correctly summarized in *Halsbury's* Law of England 4th edition Vol. 9 p.338 where it states:

"Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; . . ."

The agreement itself stated that the payment of $750,000 was "to discharge the loans and overdraft facilities which the vendor owes to the said Overseas Union Bank Ltd. The final account owing shall be determined on payment to the Bank".

The defendant agreed that he knew that the plaintiff was being pressed for repayment by the Bank when he entered into the agreement. The agreement itself indicates the sequence, and it is a logical and common sense one, in which payments were to be made culminating with the first instalment payment on March 30, 1983. It is true that Clause 6 of the first agreement was varied by the second agreement by substituting the entitlement to four shophouses for the payment of $1,350,000 but I am satisfied that the March 30 remained the operative date under the variation.

I am satisfied that the parties intended and that the first agreement required, by clear implication, that the payment to the Bank and the payment of the $1.9 million should be made before March 30, 1983 and that time was, to that extent, of the essence of the contract. I appreciate that the plaintiff's pleading was that the $1.9 million was to be paid forthwith and that this is not a finding in accordance with that fact as pleaded. I will hear the parties in this regard at the conclusion of this judgment.

I am satisfied that the second agreement was entered into because doubts arose as to the defendant's capability to raise $4,000,000 and that the husband required it so that he would have some, as he said, "security."

I am satisfied that the defendant went behind the back of the plaintiff in his dealings with Major Hussin and Dato Carvalho and that the plaintiff never authorized him to deal with them or them with him and that she authorized neither to accept any money on her behalf.

I am satisfied that up to March 30, the defendant had paid nothing under the contract and that he then sought to raise a loan with the assistance of the plaintiff and that the plaintiff gave him this assistance by signing the Power of Attorney (Ex. 16) on the understanding that a loan would be forthcoming immediately thereafter. Given the letter from the Chartered Bank dated March 15 (DB1/2), there was no likelihood that this would be so and the plaintiff was, I am satisfied, when he was told that there would be no money until after the issue of a Certificate of Occupancy, which everyone must have been aware, would not occur until some unascertained and unascertainable time in the future, entitled to revoke the Power of Attorney and terminate the agreement. The defendant, having paid nothing thereunder was clearly, by then, in breach thereof. Even if time had not been of the essence of the contract, I would have held that the defendant's failure to pay anything by the end of March and his indication that nothing would be paid until some time in the future, after issue of the Certificate of Occupancy, was a fundamental breach of the contract which entitled the plaintiff to terminate. How can a party contend that such a contract remains afoot, he, having paid nothing thereunder and having informed the other party that he does not know when he will be able to make any payments.

I am satisfied further that on April 9 and again on April 19, the defendant accepted that the agreement had been terminated and that on April 19, he asked for repayment of the sum of $540,000, which he said represented the sum outlayed by him. That he did, thereafter, further acts upon the basis that the land had been sold to him, in no way shakes my belief in the evidence of the husband that he did not, after the letter of cancella-

tion do anything to affirm the contract. It is true that the defendant, after April 19, changed his stance but he did not do so. I am satisfied, because of anything said or done by the plaintiff or her husband but, I have no doubt, because he felt that he could achieve greater financial benefit by so doing.

The husband's evidence was, at times, confused and difficult to follow but there was nothing therein which caused me to have any doubt as to its essential truthfulness.

It was particularly suggested by the defence that the husband's evidence as to the receipt of April 19 and as to the document PB2/20 was so suspect that it should be rejected and that I should accept that the husband had, on that day, accepted money from the defendant and affirmed the contract. It is true that his evidence was unsatisfactory in this regard but I am, nonetheless, left in no doubt that the agreement between the parties was that receipts be given to acknowledge expenditures claimed to have been made by the defendant and that this receipt was given in consequence of the defendant having made such a claim and that no money changed hands. I am quite satisfied that after the letter of termination, neither the plaintiff nor her husband ever did or said anything to reaffirm the contract.

P.: I will hear parties as to the finding which is not in accordance with paragraph 2A of the Amendment of Claim.

Miss Abang Zen: I am to be allowed to amend by deleting the word "forthwith" from paragraph 2A.

Mr. Chang: I object to the amendment.

P.: Are you formally objecting to the amendment but do not wish to say more than that?

Mr. Chang: That is right.

The only claim the plaintiff now pursues is a declaration that she has effectively rescinded the first agreement. I am satisfied that she is entitled to that declaration.

The defendant's counterclaim for specific performance and consequential relief is dismissed.

The defendant is to pay plaintiff's costs to be taxed and I certify for two advocates.

Mr. Chang: I ask for leave to appeal.

P.: If it is necessary, it is given.

Mr. Chang: I ask for stay of execution.

Miss Abang Zen: I oppose that. What is being stayed?

P.: I refuse a stay. If there is an appeal and it is appropriate to restrain the plaintiff from doing anything, then the Appeal Court can be approached for an order in that regard.

Mr. Chang: I ask for stay of execution as to costs.

P.: Application refused.

Claim allowed; Counterclaim disallowed.

Solicitors: *Ling & Co.; Yu & Co.*